Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Pengangkutan Jalan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-449–09 OF 2020
HANIPAH FARIKULLAH, AZIZAH NAWAWI AND SEE MEE CHUN JJCA
24 JUNE 2022

Administrative Law — Judicial review — Certiorari and mandamus — Appeal against High Court's decision in dismissing judicial review application — Whether charge against appellant was defective — Whether there was limitation for disciplinary charges to be instituted — Whether there was contradiction of words in charges made against appellant — Whether charge made against appellant was valid — Whether there was finding of guilt before imposition of punishment — Whether appellant was given opportunity to correct or contradict documents or comments — Whether investigation committee should be established — Whether oral hearing was required to be made by Disciplinary Authority — Whether disciplinary board had obligation to provide reasons for decision — Whether punishment was proportionate to charge against appellant — Whether condonation applied to appellant — Whether presence of interested parties rendered disciplinary proceedings defective — Public Officers (Conduct and Discipline) Regulations 1993 ('Discipline Regulations 1993') regs 4, 34(1), 37(2), (3), (4) and 37D — Public Services Disciplinary Board Regulations 1993 regs 15, 16(2) and (3)

The appellant was an assistant enforcement officer with the Road Transport Department ('JPJ') having first reported duty on 29 June 2008. The appellant was served a letter from the DA that disciplinary proceedings would be taken against the appellant with a view to dismissal or reduction of rank under reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Discipline Regulations 1993'). The disciplinary action was based on two charges. The DA then informed the appellant of the dismissal and that the DA in a meeting on 31 October 2017 found the appellant had committed the first charge by contravening reg 4(2)(c) and 4(2)(i) of the Discipline Regulations 1993 and was exculpated of the second charge. The appellant was dismissed from office pursuant to a dismissal letter dated 23 November 2017 issued by the Disciplinary Authority ('DA'). The appellant appealed to the Disciplinary Appeal Board ('DAB') which dismissed the appeal and affirmed the DA's decision. The appellant applied for an order of certiorari to quash the DA and DAB's decision; a declaration that the appellant was entitled to be reinstated as

a public office in the appellant's last posting without any loss of seniority, salary increment, salary, emoluments and all other benefits; and an order of mandamus to compel the respondents to reinstate the appellant as prayed for. The application was dismissed by the High Court on 11 August 2020. On appeal, the appellant submitted that: (a) there was a breach of natural justice where the charges were submitted to be defective, baseless, vague and contradictory; (b) the DB ought to have made a finding of guilt before imposing the punishment of dismissal as required by reg 37D of the Discipline Regulations 1993; (c) there had been a breach of procedure and natural justice when there was no opportunity given to correct or contradict the comments of the Head of Department at the DA stage, documents from the Digital Technology Section JPJ and the comments of the Head of Department on the appeal and the grounds of the chairman of DAB; (d) there was a breach was in not establishing an investigation committee pursuant to reg 37(3) and (4) of the Discipline Regulations 1993 and in not granting an oral hearing as requested in the letter of appeal; (e) there was a failure to give reasons for the decision made as per reg 15(3) of the Disciplinary Regulations 1993; (f) the doctrine of proportionality and unreasonableness applied as there was a disparity of punishment; (g) there was passive condonation towards the appellant; and (h) the presence of interested parties during the proceedings had rendered the disciplinary proceedings defective.

Held, dismissing the appeal and affirming the High Court's order with costs:

(1) The court agreed with the High Court judge that reg 37(2)(a) and (b) of the Discipline Regulations 1993 did not provide for the acknowledgement of receipt to be part of the charge. All that was required was for the charge containing the facts of the disciplinary offence and the grounds on which it was proposed to dismiss or reduce the appellant's rank to be sent and to require the officer to make a written representation within 21 days from the date of being informed of the charge. As its name suggested, the acknowledgment of receipt was to acknowledge receipt and its purpose was to ensure the officer had indeed received the DA's letter as he would have 21 days to provide a written representation. Nothing turned on the discrepancy to render the charge defective (see para 49).

(2) There was no limitation for any disciplinary charges to be instituted under the Discipline Regulations 1993. There was simply no express or implied provision to the effect. For the issue of contradiction of words in the charge, it was explained that both codes 01–450 and 211–4060 were effectively the same. There was no contradiction or confusion. As to no particulars of the advantage being provided, the charge was framed using the exact words in reg 4(2)(c)(ii) of the Discipline Regulations 1993 (see paras 50, 53 & 56).

(3) On the issue of validity of charges, the court agreed with the High Court judge that the first charge contained particular sufficient for the appellant to prepare the presentation namely, inter alia, dates of the 116 transactions, the identity card numbers of the CDL holders, the original class and the class added and the transaction code and ID (see para 59).

(4) The appellant referred to reg 37D (a) and (b) Discipline Regulations 1993 that the DA should have found the appellant guilty of the first charge before it could decide on the appropriate punishment. Both paragraphs stated if the DA 'finds the officer guilty' and went on as to the punishment to be meted. Regulation 37(4) provided that if the representation did not exculpate the appellant, the DA shall proceed to consider and decide on the dismissal or reduction in rank. Regulation 37D did not apply when there was no investigation committee established (see paras 61, 63 & 65).

(5) There was no requirement for the respondents to give notice to the appellant of its intention to refer to any documents which necessarily included the comments. There was no application to the disciplinary board to be provided with the documents. On the alleged contravention of reg 16(2) and (3) of the Disciplinary Board Regulations 1993, where the DAB shall decide solely on the merits of the appeal without receiving any further statement or evidence and any further statement or evidence was subject to the right to be heard, the High Court judge had made a finding the emails in question were a clarification of a matter raised in the appeal. The court found no good reason to disagree with it as there was indeed a matter raised and a response provided (see paras 67–68).

(6) Regulation 37(5) Discipline Regulations 1993 conferred a discretion on the DA to establish an investigation committee if further clarification was needed. There was no further clarification required more so when the appellant had in the written representation admitted the charges. There was no merit to the contention that an investigation committee should have been established (see paras 71–72).

(7) The court found that there was no requirement for an oral hearing at the DA or DAB. In that regard, reg 37(2)(b) and (4) of the Discipline Regulations 1993 provided for a written representation whereas reg 15(1) of the Disciplinary Board Regulations 1993 provided that an appeal shall be made in writing (see para 73).

(8) A perusal of the provisions of the Disciplinary Board Regulations 1993 would indicate that there was no obligation on the disciplinary board to provide reasons. It merely provided the procedure on preparing the record of proceedings which included the grounds relied on and the period within which the record together with the grounds of decision

were to be sent. There was nothing in the disciplinary procedure in the Discipline Regulations 1993 which required reasons to be given (see paras 78–79).

(9) The court agreed with the appellant that proportionality could be a ground for judicial review. On the factual matrix, there were ample grounds to find that the punishment was proportionate to the charge (see paras 84 & 86).

(10) On the issue of condonation, the acts of condonation would amount to passive condonation, of not taking any action. Without any disciplinary action having been taken at that point of time, there was nothing to prevent the appellant from being called to attend the interviews and even succeeding. The acts did not amount to passive condonation (see para 89).

(11) On the presence of the interested parties, it could be said those parties were present but did not participate in the proceedings. The court looked at participation and not presence, of which there was none. Therefore, the court found that the presence of the aforesaid parties did not render the disciplinary proceedings defective (see paras 96, 99 & 104).

[Bahasa Malaysia summary

Perayu merupakan penolong pegawai penguat kuasa Jabatan Pengangkutan Jalan (JPJ) yang pertama kali melapor diri pada 29 Jun 2008. Perayu telah diserahkan surat oleh PBT yang menyatakan bahawa prosiding tatatertib akan dimulakan terhadap perayu untuk memecat atau menurunkan pangkat di bawah peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan Tatatertib 1993'). Tindakan tatatertib tersebut berdasarkan dua pertuduhan. PBT kemudian memaklumkan perayu mengenai pemecatan tersebut dan PBT dalam mesyuarat pada 31 Oktober 2017 mendapati perayu telah melakukan kesalahan di dalam pertuduhan pertama dengan melanggar peraturan 4(2)(c) dan 4(2)(i) Peraturan-Peraturan Tatatertib 1993 dan dibebaskan daripada pertuduhan kedua. Perayu dipecat daripada jawatan tersebut menurut surat pemecatan bertarikh 23 November 2017 yang dikeluarkan oleh Pihak Berkuasa Tatatertib ('PBT'). Perayu merayu kepada Lembaga Rayuan Tatatertib ('LRT') yang menolak rayuan tersebut dan mengesahkan keputusan PBT. Perayu memohon perintah certiorari untuk membatalkan keputusan PBT dan LRT; perisytiharan bahawa perayu berhak untuk dikembalikan semula sebagai pejabat awam dalam penempatan terakhir perayu tanpa kehilangan kekananan, kenaikan gaji, gaji, emolumen dan semua faedah lain; dan perintah mandamus untuk memaksa responden mengembalikan semula perayu seperti yang dipohon. Permohonan tersebut ditolak Mahkamah Tinggi pada 11 Ogos 2020. Semasa merayu, perayu menghujahkan bahawa: (a) terdapat pelanggaran keadilan semula jadi di mana pertuduhan tersebut sebagai defektif, tidak berasas, tidak jelas dan bercanggah;

(b) LRT sepatutnya membuat keputusan sebelum menjatuhkan hukuman pemecatan sebagaimana yang dikehendaki oleh peraturan 37D Peraturan-Peraturan Tatatertib 1993; (c) telah berlaku kesalahan prosedur dan keadilan semula jadi apabila tiada peluang yang diberikan untuk membetulkan atau bercanggah dengan ulasan Ketua Jabatan di peringkat PBT, dokumen dari Bahagian Teknologi Digital JPJ serta ulasan Ketua Jabatan mengenai rayuan tersebut dan alasan pengerusi LRT; (d) terdapat pelanggaran dengan tidak menubuhkan jawatankuasa siasatan menurut peraturan 37(3) dan (4) Peraturan-Peraturan Tatatertib 1993 dan tidak mengadakan pendengaran lisan seperti yang dinyatakan dalam surat rayuan tersebut; (e) terdapat kegagalan untuk memberi alasan bagi keputusan yang dibuat mengikut perkara 15(3) Peraturan-Peraturan Tatatertib 1993; (f) doktrin perkadaran dan tidak munasabah terpakai kerana terdapat perbezaan hukuman; (g) terdapat kecenderungan pasif terhadap perayu; dan (h) kehadiran pihak-pihak yang berkepentingan semasa prosiding telah menyebabkan prosiding tatatertib itu defektif.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi dengan kos:

(1) Mahkamah ini bersetuju dengan hakim Mahkamah Tinggi bahawa peraturan 37(2)(a) dan (b) Peraturan-Peraturan Tatatertib 1993 tidak memperuntukkan pengakuan penerimaan sebagai sebahagian daripada pertuduhan. Perkara yang harus dipatuhi adalah pertuduhan haruslah mengandungi fakta kesalahan tatatertib dan alasan untuk memecat atau menurunkan pangkat perayu dihantar dan menghendaki pegawai tersebut membuat representasi bertulis dalam tempoh 21 hari dari tarikh pemakluman pertuduhan tersebut. Pengakuan penerimaan adalah untuk mengakui penerimaan dan tujuannya adalah untuk memastikan pegawai tersebut benar-benar menerima surat PBT kerana dia berhak untuk tempoh 21 hari untuk memberikan representasi bertulis. Tiada sebarang percanggan yang menyebabkan pertuduhan tersebut defektif (lihat perenggan 49).

(2) Tiada had limitasi untuk sebarang pertuduhan tatatertib dimulakan di bawah Peraturan-Peraturan Tatatertib 1993. Tiada peruntukan yang nyata atau tersirat untuk tujuan tersebut. Mengenai isu percanggahan perkataan di dalam pertuduhan tersebut, telah dijelaskan bahawa kedua-dua kod 01–450 dan 211–4060 adalah sama. Tiada percanggahan atau kekeliruan. Bagi tiada butir-butir kelebihan yang diberikan, pertuduhan tersebut dirangka menggunakan perkataan yang tepat menurut peraturan 4(2)(c)(ii) Peraturan-Peraturan Tatatertib 1993 (lihat perenggan 50, 53 & 56).

(3) Mengenai isu keesahan pertuduhan, mahkamah ini bersetuju dengan hakim Mahkamah Tinggi bahawa pertuduhan pertama mengandungi

butiran yang mencukupi untuk perayu menyediakan representasi iaitu, antara lain, tarikh-tarikh 116 transaksi, nombor kad pengenalan pemegang-pemegang CDL, kelas asal dan kelas ditambah serta kod transaksi dan ID (lihat perenggan 59).

(4) Perayu merujuk kepada peraturan 37D (a) dan (b) Peraturan-Peraturan Disiplin 1993 bahawa PBT sepatutnya memutuskan perayu bersalah atas pertuduhan pertama sebelum memutuskan hukuman yang sesuai. Kedua-dua perenggan menyatakan sekirangya PBT 'mendapati pegawai itu bersalah' dan meneruskan hukuman yang akan dijatuhkan. Peraturan 37(4) memperuntukkan bahawa sekiranya representasi tersebut tidak membebaskan perayu, PBT hendaklah meneruskan untuk mempertimbangkan dan memutuskan pemecatan atau penurunan pangkat. Peraturan 37D tidak terpakai apabila tiada jawatankuasa siasatan ditubuhkan (lihat perenggan 61, 63 & 65).

(5) Tiada keperluan untuk responden-responden memberi notis kepada perayu mengenai niatnya untuk merujuk kepada mana-mana dokumen termasuk komen tersebut. Tiada permohonan kepada lembaga disiplin untuk diserahkan dokumen berkenaan. Mengenai hujahan pelanggaran peraturan 16(2) dan (3) Peraturan-Peraturan Lembaga Tatatertib 1993, di mana LRT hendaklah memutuskan pertuduhan tersebut semata-mata mengenai merit rayuan tersebut tanpa menerima sebarang keterangan lanjut dan sebarang kenyataan atau keterangan lanjut tersebut tertakluk kepada hak untuk didengar, hakim Mahkamah Tinggi telah membuat dapatan e-mel berkenaan adalah penjelasan mengenai perkara yang dibangkitkan dalam rayuan tersebut. Mahkamah ini mendapati tiada alasan kukuh untuk tidak bersetuju dapatan tersebut kerana memang ada perkara yang dibangkitkan dan jawapan telah diberikan (lihat perenggan 67–68).

(6) Peraturan 37(5) Peraturan-Peraturan Tatatertib 1993 memberi budi bicara kepada PBT untuk menubuhkan jawatankuasa siasatan sekiranya penjelasan lanjut diperlukan. Tiada penjelasan lanjut diperlukan lebih-lebih lagi apabila perayu dalam representasi bertulis mengakui pertuduhan-pertuduhan tersebut. Tiada merit untuk hujahan bahawa jawatankuasa siasatan sepatutnya ditubuhkan (lihat perenggan 71–72).

(7) Mahkamah ini mendapati bahawa tiada keperluan untuk pendengaran lisan di PBT atau LRT. Mengenai perkara ini, peraturan 37(2)(b) dan (4) Peraturan-Peraturan Tatatertib 1993 memperuntukkan representasi bertulis manakala peraturan 15(1) Peraturan-Peraturan Lembaga Tatatertib 1993 memperuntukkan bahawa rayuan hendaklah dibuat secara bertulis (lihat perenggan 73).

(8) Penelitian terhadap peruntukan Peraturan-Peraturan Lembaga Tatatertib 1993 menunjukkan bahawa tiada kewajipan bagi lembaga tatatertib

untuk memberikan alasannya. Ia hanya menggariskan prosedur untuk menyediakan rekod prosiding yang termasuk alasan-alasan dan tempoh di mana rekod dengan alasan keputusan akan dihantar. Tiada sebarang prosedur tatatertib dalam Peraturan-Peraturan Tatatertib 1993 yang memerlukan alasan-alasan diberikan (lihat perenggan 78–79).

(9) Mahkamah ini bersetuju dengan perayu bahawa perkadaran boleh menjadi alasan untuk semakan kehakiman. Menurut fakta kes ini, terdapat alasan-alasan yang mencukupi bahawa keputusan tatatertib tersebut berkadaran dengan pertuduhan tersebut (lihat perenggan 84 & 86).

(10) Mengenai isu kecenderungan, tindakan kecenderungan boleh menjadi kecenderungan pasif apabila tidak mengambil sebarang tindakan. Tanpa sebarang tindakan tatatertib yang telah diambil pada masa itu, tiada sebarang alasan untuk menghalang perayu daripada dipanggil untuk menghadiri soalsiasat dan ianya berjaya dilakukan. Perbuatan tersebut tidak terjumlah kepada kecenderungan pasif (lihat perenggan 89).

(11) Mengenai kehadiran pihak-pihak yang berkepentingan, pihak-pihak tersebut hadir tetapi tidak mengambil bahagian dalam prosiding tersebut. Mahkamah melihat penyertaan dan bukan kehadiran, yang mana tiada di dalam kes ini. Oleh itu, mahkamah mendapati bahawa kehadiran pihak-pihak tersebut tidak menyebabkan prosiding tatatertib tersebut defektif (lihat perenggan 96, 99 & 104).]

Cases referred to

Chai Kok Choi v Ketua Polis Negara & Ors [2008] 1 ML J 725, FC (refd)
Esso Production (M) Inc v Maimunah Bte Ahmad & Anor [2002] 2 MLJ 458; [2002] 3 CLJ 242, CA (folld)
Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175, FC (distd)
Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29; [2003] 3 CLJ 310, CA (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)
Lee Mew Kwan v Royal Lake Club (through Jasmin bt Mohd Sharif as Secretary and Officer to Kelab Taman Perdana Diraja Kuala Lumpur) [2013] 1 MLJ 583, HC (refd)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586, CA (refd)
Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran

Seberang Perai & Anor [2018] 3 MLJ 784; [2018] 2 CLJ 715, CA (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (folld)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
R Rama Chandran v The Industrial Court Of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Surinder Singh Kanda v Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan Satu Lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, FC (refd)
Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [2007] 1 CLJ 300, HC (refd)

Legislation referred to

Federal Constitution art 135(2)
Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(c), (2)(c)(ii), (2)(f), (2)(i), 34, 34(1), (1)(c)(ii), 37, 37(2)(a), (2)(b), (3), (4), (5), 37D, 37D(a), (b), 38
Public Services Disciplinary Board Regulations 1993 regs 2, 12, 15(1), (3), (4), 16(2), (3)

Appeal from: *Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron (Pengerusi Lembaga Tatatertib, Kumpulan Sokongan (No 1)) & Ors* [2020] MLJU 1920 (High Court, Shah Alam)

Ebrina bt Zubir (Maniam Nair & Co) for the appellant.
Noraazlina bt Razali (with Natra bt Mazman) (Attorney General's Chambers) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION AND PARTIES

[1] The appellant was an assistant enforcement officer with the Road Transport Department (JPJ) having first reported for duty on 29 June 2008. He was dismissed from office pursuant to the dismissal letter dated 23 November 2017 issued by the Disciplinary Authority (DA). The appellant appealed to the Disciplinary Appeal Board (DAB) which on 13 November 2018 dismissed the appeal and affirmed the DA's decision,

[2] The first respondent was the chairman of the DA who signed the letter dated 7 April 2017 for disciplinary action, the second respondent was the chairman of the DA who signed the letter of dismissal, the third respondent the DA, the fourth respondent the chairman of the DAB, the fifth respondent the DAB and the sixth respondent the Government of Malaysia.

APPLICATION FOR JUDICIAL REVIEW

[3] The appellant applied for an order of certiorari to quash the DA and DAB's decision; a declaration that he is entitled to be reinstated as a public officer in his last posting without any loss of seniority, salary increment, salary, emoluments and all other benefits; and an order of mandamus to compel the respondents to reinstate him as prayed for.

[4] The application was dismissed by the High Court on 11 August 2020. We affirmed the decision for which we now give our reasons.

BACKGROUND FACTS

[5] The appellant was served with a letter dated 7 April 2017 (encl 5/15–21) from the DA that disciplinary proceedings would be taken against him with a view to dismissal or reduction of rank under reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993.

[6] The disciplinary action was based on two charges:

(a) the first charge listed 116 transactions from 1 February 2012 to 4 September 2012 when the appellant was on duty at JPJ Selangor where the appellant had amended details of driving licences (CDLs) using the transaction code '01–4050' and ID '105151MEZ' contrary to SOP *Prosedur Pinda Butir Lesen Memandu* (JPJ's SOP) issued on 15 March 2011 by the driver's licence section at JPJ Head Office. Such conduct was likely to cause a reasonable suspicion the appellant had used his public position for his personal advantage within the meaning of reg 4(2)(c) of the Discipline Regulations 1993 and insubordination pursuant to reg 4(2)(i); and

(b) the second charge is related to the appellant who while on duty at JPJ Selangor, has added Classes H, F, G and I to his own CDL without complying with JPJ's SOP. Such conduct was likely to cause a reasonable suspicion the appellant had used his public position for his personal advantage within the meaning of reg 4(2)(c) of the Discipline Regulations 1993 and being dishonest or untrustworthy under reg 4(2)(f).

[7] The *Surat Akuan Penerimaan* (encl 5/22) which accompanied the DA's letter was entitled 'TINDAKAN TATATERTIB BUKAN DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT'. The appellant submitted his written representation to the DA's letter by letter dated 9 May 2017 (encl 5/24–25). In that letter he wrote as follows:

> Adalah saya dengan ini ..., dengan rendah hati diri dan penuh keinsafan mengaku bersalah di atas kesemua pertuduhan yang dinyatakan terhadap saya.
>
> ...
>
> 4. Saya berharap keputusan atas pertuduhan ini tidak sehingga dibuang kerja memandangkan ekonomi sekarang yang sukar mendapat pekerjaan. Saya juga telah berkahwin dan mempunyai dua (2) orang anak dan sedang menanggung ibu bapa di kampung. Sedikit sebanyak ia akan menjejaskan pendapatan isi rumah.
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> 5. Namun, maaf saya dengan rendah diri sekali lagi terdapat sedikit kemusykilan di pihak saya mengenai surat pertuduhan yang telah saya terima pada 04 Mei 2017.
>
> (i) Surat Akuan Terima yang telah ditandatangani bertajuk TINDAKAN TATATERTIB BUKAN DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT sedangkan surat pertuduhan yang telah diterima adalah TINDAKAN TATATERTIB DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT. (Lampiran 1)
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> (ii) Ketika kesalahan dilakukan saya bertugas di Jabatan Pengangkutan Jalan Negeri Selangor, Cawangan Bangi namun di surat pertuduhan yang telah diterima menyatakan bertugas di Jabatan Pengangkutan Jalan Negeri Selangor. (Lampiran 2)
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> (iii) Terdapat sedikit kemusykilan pada pertuduhan Pertama yang menyatakan urusniaga Pinda Butir Lesen Memandu (CDL) menggunakan kod urusniaga 01–4050 tetapi merujuk kepada SOP Prosedur Pinda Butir Lesen Memandu tarikh 15 Mac 2011 keluaran Bahagian Pelesenan Pemandu Ibu Pejabat JPJ 6.1(4) untuk melaksanakan pindaan bagi CDL memerlukan kod 2114050. (Lampiran 3)
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> (iv) Mengikut Pertuduhan Kedua saya telah melakukan kesalahan di bawah Peraturan 4(2)(c)(ii) dan 4(2)(f) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 namun begitu takrifan di m/s 7 telah menjelaskan takrifan 4(2)(f) dan (4)(2)(g). (Lampiran 4)
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> 6. Saya dengan rasa rendah diri sekali lagi memohon maaf dan berharap mendapat pertimbangan sewajarnya daripada Dato' Sri agar hukuman dijatuhkan kepada saya tidak sehingga hilang pekerjaan dan menjejaskan pendapatan isi rumah. Saya juga berjanji akan melaksanakan tugas dengan lebih berintegriti dan berjanji tidak mengulangi kesilapan yang sama pada masa hadapan. Saya berharap dengan rasa rendah diri dan keinsafan ini mendapat pertimbangan yang sewajarnya dari pihak Dato' Sri.

[8] By letter dated 23 November 2017 (encl 5/34–35), the DA informed the appellant of his dismissal and that the DA in a meeting on 31 October 2017

found the appellant had committed the first charge by contravening reg 4(2)(c) and 4(2)(i) Discipline Regulations 1993 and was exculpated of the second charge.

[9] Pursuant to the Public Services Disciplinary Board Regulations 1993 (Disciplinary Board Regulations 1993), an appeal letter dated 9 January 2018 (encl 5/38–40) against the decision of the DB was submitted to the DAB. The DAB by letter dated 13 November 2018 (encl 5/42–43) dismissed the appeal and affirmed the DB's decision.

HIGH COURT DECISION

[10] The judgment of the High Court judge (HCJ) dated 29 October 2020 can be found at encl 7/15–76.

[11] The HCJ considered whether the DA and/or DAB decisions involved procedural impropriety from various sub-issues.

[12] The first sub-issue was, whether in view of the title in *Surat Akuan Penerimaan* of *TINDAKAN TATATERTIB BUKAN DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT*, the two charges were defective, the contents of the two charges had confused the appellant and whether there was a deprivation of the right to be afforded a reasonable opportunity of being heard. It was held the acknowledgment of receipt was not part of the two charges wherein the purpose was to ensure the appellant had been notified and from which he had 21 days to send his representation. The error was thus not material. The error did not confuse the appellant as the two charges had complied with reg 34(1) of the Discipline Regulations 1993 and contained particulars to enable him to prepare his written representation.

[13] With regard to the sub-issues of an oral hearing or the establishment of an investigation committee, this was not provided in the Discipline Regulations 1993 and Disciplinary Board Regulations 1993.

[14] As to whether the DA is required to find the appellant guilty of the first charge before it could consider the punishment, the HCJ found that reliance cannot be placed on reg 37D of the Discipline Regulations 1993.

[15] On whether interested parties can attend the meetings of the DA and DAB, it was found that reg 2 and 12 of the Disciplinary Board Regulations 1993 do not prohibit such attendance. In line with *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310, the DA and DAB are masters of their own procedure.

[16] There was no breach of reg 16(2) and (3)of the Disciplinary Board Regulations 1993 on any further statement or evidence where the emails in question were a clarification of a matter raised.

[17] The DA and DAB were not obliged to give reasons for their decisions as there is no such stipulation in the relevant provisions of the regulations.

[18] There was thus no procedural impropriety regarding the DA and DAB decisions such that there could not be an order of certiorari to quash the decisions.

[19] The HCJ next considered whether the DA and DAB decisions were unlawful. On whether the first charge was stale where the first of the 116 transactions was on 12 February 2012, there was really no time period for a disciplinary charge to be instituted. The appellant could not rely on the defence of condonation where none was prescribed. Illegality, therefore, did not arise.

[20] Neither could the decisions of the DA and DAB be said to be irrational. This was due to the appellant's admission in the written representation, the appeal had expressly referred to the written representation and yet the admission was not retracted in the appeal; the appellant's wealth of experience meant he could not feign ignorance of the consequences of his admission and his exoneration of the second charge despite his admission, showed the DA acted in a just manner.

[21] The HCJ did not accept disproportionality as a ground to set aside due to a doubt whether it can be a fourth ground for judicial review. Even if it could be a ground, the decisions were not disproportionate as the appellant had been guilty of a serious disciplinary offence of 116 transactions over a period of more than six months, there was an abuse of public position for personal advantage and the punishment would deter the commission of the same or similar disciplinary offence.

SUBMISSIONS OF THE APPELLANT

[22] Reference was made to *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626; [2007] 1 CLJ 300 on how a decision making process may be challenged and where an impugned decision is flawed on illegality, unreasonableness and procedural impropriety covering failure to observe basic rules of natural justice, to act with procedural fairness, to observe procedural rules expressly laid down and possibly, proportionality.

[23] The first point of contention was a breach of natural justice where the charges were submitted to be defective, baseless, vague and contradictory. Reference was made to *Esso Production (M) Inc v Maimunah Bte Ahmad & Anor* [2002] 2 MLJ 458; [2002] 3 CLJ 242 where it was held that even if the charges were admitted, the validity or otherwise of the charges was the threshold of the matter before the merits could be considered.

[24] In this instance, the DB's letter dated 7 April 2017 and the acknowledgment of receipt constituted the notice to show cause. There was a material discrepancy between the DB's letter which was disciplinary action with a view to dismissal whereas the acknowledgment of receipt stated the disciplinary action was not with a view to dismissal or reduction in rank. The appellant had raised this in his representation.

[25] The charges were defective firstly for being stale. Further, the first charge was self-contradictory and confusing where it was for 'meminda butir lesen memandu' where the column for the 116 transactions referred to 'Kelas Yang Ditambah'. The transaction code used by the appellant was 01–4050 whereas any amendment would use the code 211–4050. The charge did not state the exact location of where the appellant was working, only JPJ Selangor. The appellant had also raised this in his representation.

[26] The charge was related to the use of public position for personal advantage but there were no particulars on the advantage obtained.

[27] It was next submitted that the DB ought to have made a finding of guilt before imposing the punishment of dismissal as required by reg 37D of the Discipline Regulations 1993.

[28] There had been a breach of procedure and natural justice when there was no opportunity given to correct or contradict the comments of the head of department at the DA stage, documents from the digital technology section JPJ and the comments of the head of department on the appeal and the grounds of the chairman of DAB. The documents were prejudicial and damaging and in some instances a breach of reg 16(2) and (3) of the Disciplinary Board Regulations 1993.

[29] The further breach was in not establishing an investigation committee pursuant to reg 37(3) and (4) of the Discipline Regulations 1993 and in not granting an oral hearing as requested in the letter of appeal.

[30] The next issue pertained to the failure to give reasons as per reg 15(3) Disciplinary Board Regulations 1993. Reference was made to MP Jain and SN Jain on *Principles of Administrative Law* (5th Ed, 2008) at p 319 where 'when

A a statute imposes the requirement of giving reasons for taking a decision, the provision is treated as mandatory and the failure to give reasons would be fatal to the action taken'. Reasons are required where the decision affects one's livelihood and where the DA and DAB exercise quasi-judicial functions.

B **[31]** It was further submitted that the doctrine of proportionality and unreasonableness applied. The appellant had pleaded sufficient facts where he had an excellent service record and was awarded Certificates of Excellent Service in 2011 and 2015. There was a disparity of punishment such that proportionality would apply. The respondents had focused only on dismissal C and there was non-consideration or non-application of mind to relevant factors.

[32] There was also condonation. The appellant was not interdicted, delayed D for nearly five years, two other persons were charged for similar disciplinary offences much earlier, the charges were stale and he had been allowed to continue working. He was called to attend interviews for promotion where he was successful in 2017 subject to vacancy and was a reserve candidate for an acting post. This amounted to passive condonation which has been recognised E by the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573.

[33] The presence of interested parties had caused the disciplinary F proceedings to be defective. In the meeting of the DB, those present were Jamil bin Mohd Dahlan (investigating officer and director of integrity/discipline), Noraini bt Mohd Nawi (principal assistant director, integrity section), Noorashikin bt Bahari (assistant director, discipline unit) and JPJ officers. In the DAB, there were 17 others including the legal advisor. Where the DAB was G legally represented, the appellant ought to be allowed to be heard. Reference was made to *Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1983] 1 ML J 175 that it is contrary to natural justice to allow one side to be legally represented but refuse the same right to the other and that this is a gross violation of the fundamental principles of natural justice.

H

SUBMISSIONS OF THE RESPONDENTS

[34] With regard to the transaction code 01–4050, this was indeed the code for 'pindaan' whereas the code 0211–4050 was the 'menu *aras capaian ke kod* I 01–4050', as explained in the email dated 26 October 2018 (encl 2/563-565). Thus, both codes were the transaction codes for amendment of driving licences. There was no confusion or contradiction. The charge was clearly for amendment as the transaction code to 'menambah kelas lesen' is another code 01–2000 and 01–2008. On whether the charge was with or without a view to

dismissal, the acknowledgment of receipt was to acknowledge the DA's letter dated 7 April 2017 had been received on 4 May 2017. The heading to his written representation dated 9 May 2017 was 'Tindakan Tatatertib Dengan Tujuan Buang Kerja atau Turun Pangkat'. This showed the appellant was aware that the charge was with a view towards dismissal or reduction in rank and he had not been confused.

[35] With regard to the location of the appellant's workplace, it was clarified in the affidavits in reply that it was in the state of Selangor, Bangi Branch.

[36] The charges contained sufficient particulars and were not vague, baseless or confusing.

[37] There was no requirement for a finding of guilt before the imposition of dismissal nor the establishment of an investigation committee. There was also no right to an oral hearing as laid down in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525.

[38] On no opportunity being given to correct or contradict the comments or documents of the relevant officers and departments, there was no requirement of any notice to be given of the intention to use the aforesaid.

[39] With regard to unreasonableness and proportionality, the facts of the case did not favour the appellant where the punishment was proportionate to the offence and the representation had been duly considered.

[40] There was no issue of condonation, passive or otherwise. This had not been raised in the disciplinary proceedings and in any event, there was no assurance from the fifth respondent that no action would be taken.

[41] The presence of interested parties was not prohibited by regs 2 and 12 of the Disciplinary Board Regulations 1993.

OUR DECISION

[42] Before we deal with the merits of the appeal, let us refer to the law in relation to the court's approach in disciplinary cases. In the case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 at pp 165–166; [2012] 3 CLJ 577 at pp 597–598, the Federal Court held:

> [36] The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. *The courts will only intervene in disciplinary cases where there was a*

A *fundamental procedural flaw.* The courts cannot exceed its role in cases of this genre as the instant appeal. *The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the Disciplinary Authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts.* B *Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal.*

C [38] In the instant appeal, the plaintiff sought a declaration that his dismissal is unlawful, null and void and of no effect. In cases of this genre, the court reviews the lawfulness of a decision or action made by the Disciplinary Authority which is a public body. Such action is tantamount to a challenge to the way in which the decision has been made by the public body rather than the rights and wrongs of the conclusion reached. The court is not really concerned with the conclusions of that D process and whether the conclusions were 'right', as long as the right procedures have been followed. (Emphasis added.)

[43] In *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 at pp 158–159; [1998] 1 CLJ 405 at pp 411–413, the Federal Court laid down E the rules that are applicable to a court exercising supervisory review over the decision of a disciplinary body and it held as follows:

After the High Court had judicially reviewed and upheld the Disciplinary Authority's finding of misconduct or breach of any provision of the code of conduct under the general orders, in regard to any further and consequential order of F punishment or penalty as prescribed by the general orders and imposed on the public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with the same for reasons which we will discuss as follows.

G To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.

H *It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential* I *punishment as explained above.* (Emphasis added.)

[44] Added to that, it is also trite law that the DA is the best judge of the seriousness of the misconduct of its members and the appropriate penalty. As stated by the Federal Court in *Ng Hock Cheng* at p 159 (MLJ); p 413 (CLJ):

> Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members; in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.

[45] The charges levelled against the appellant were with a view to dismissal or reduction in rank where the procedure for such disciplinary cases are provided in reg 37 of the Discipline Regulations 1993. We note there were initially two charges of which the appellant was ultimately exonerated of the second charge.

[46] The thrust of the appeal centered on the decisions of the DA and/or DAB which involved the issues of procedural impropriety, illegality, irrationality and proportionality.

CHARGES

[47] These relate to the issue of the charges being defective, vague and contradictory. Within this contention was the discrepancy of two documents.

Discrepancy

[48] It was alleged there was a material discrepancy between the DB's letter dated 7 April 2017 (encl 5/15–21) which was disciplinary action with a view to dismissal or reduction in rank, whereas the acknowledgment of receipt (encl 5/22) stated the disciplinary action was not with a view to dismissal or reduction in rank. According to the appellant, the DB's letter and the acknowledgment of receipt constituted the notice to show cause. The notice was thus rendered defective.

[49] We agree with the HCJ that reg 37(2)(a) and (b) of the Discipline Regulations 1993 do not provide for the acknowledgment of receipt to be part of the charge. All that was required was for the charge containing the facts of the disciplinary offence and the grounds on which it was proposed to dismiss or reduce his rank to be sent and to require the officer to make his written representation within 21 days from the date of being informed of the charge. As its name suggests, the acknowledgment of receipt was to acknowledge receipt and its purpose was to ensure the officer had indeed received the DA's letter as he would have 21 days to provide his written representation. Nothing turns on this discrepancy to render the charges defective.

Stale charges

[50] It was submitted that the charges were stale as they were instituted in 2017 for transactions which occurred in 2012. We find that there is no

limitation, as it were, for any disciplinary charges to be instituted under the Discipline Regulations 1993. There is simply no express or implied provision to this effect. Support for the proposition of no time limit can be found in *Vickneswary* at p 14 (MLJ); p 592 (CLJ) where the Federal Court stated:

> [34] The general orders do not provide for the time when a disciplinary action is required to be taken against any officer for a disciplinary offence. Applying the principles earlier stated that where procedure is provided by written laws then the courts should be wary of invoking common law, the delay, even if there was one, is not a ground for holding that there was procedural unfairness.

Contradiction within the charge

[51] Within the charge itself, it was submitted that there was a contradiction between the words 'meminda butir lesen memandu' where the column for the 116 transactions referred to 'Kelas Yang Ditambah'. The transaction code said to be used by the appellant was 01–4050 whereas any amendment would use the code 211–4050 and 'Tambah' was 211–2000.

[52] For convenience, we have reproduced that part of the first charge and the first five and last five transactions. The charge and all the 116 transactions can be found in encl 5/16–20:

> PERTUDUHAN PERTAMA
>
> Bahawa tuan, Ezaky Mulya bin Sapawi, No. K/P: 820216–01–6401, Pembantu Penguatkuasa Gred KP19, Jabatan Pengangkutan Jalan Negeri Johor, semasa bertugas di Jabatan Pengangkutan Jalan Negeri Selangor, pada tarikh-tarikh yang dinyatakan dibawah, didapati telah meiakukan urusniaga pinda butir lesen memandu (CDL) sebanyak 116 transaksi menggunakan kod urusniaga 01–4050 dengan ID 105151 MEZ iaitu Ezaky Mulya bin Sapawi adalah gagal mematuhi SOP Prosedur Pinda Butir Lesen Memandu yang dikeluarkan oleh Bahagian Pelesenan Pemandu Ibu Pejabat JPJ Malaysia bertarikh 15/03/2021 seperti berikut:

Bil	Tarikh URUSNIAGA	NOMBOR KAD PENGENALAN	KELAS ASAL	KELAS YANG DITAMBAH
1.	14/02/2012	820216016401	B, D, E	F, G, H, I
2.	16/02/2012	780517075321	D	B
3.	22/02/2012	790531015973	D, E	B
4.	06/03/2012	A0170051	D, E, H, I	B2
5.	06/02/2012	A1640032	B2, D, E	B
112.	02/07/2012	850912065443	B2	D
113.	03/07/2012	890317115365	B2	D
114.	03/07/2012	A0494502	B2	D
115.	05/07/2012	821104016073	B2	D
116.	04/09/2012	A3639045	B2	B2

[53] It was explained that both the codes 01–4050 and 211–4050 were effectively the same. This was because 211–4050 'merupakan capaian ke skrin sistem bagi maksud melaksanakan transaksi pindaan butir lesen CDL' (encl 6/112). The charge was always on 'pindaan' and not 'tambah kelas', for which the code for 'tambah kelas' was different, namely 01–2000 and 01–2008 as evident from encl 5/350–351. Hence, we find no contradiction or confusion.

[54] It is noted that the second charge (encl 5/20–21) pertained to 'tambah kelas' of which the appellant had been exonerated.

[55] It was confirmed by the respondents the transactions occurred in Bangi which is in Selangor and hence the charge 'semasa bertugas di JPJ Selangor' was in order.

[56] As to no particulars of the advantage being provided, the charge is framed using the exact words in reg 4(2)(c)(ii) of the Discipline Regulations 1993.

Validity of charges

[57] The charges contained the grounds for the disciplinary proceedings as required by reg 34(1)(c)(ii) of the Discipline Regulations 1993 which essentially states that no officer shall be dismissed or reduced in rank in any disciplinary proceedings unless he has been informed in writing of the grounds on which such action is proposed.

[58] As stated in *Utra Badi* at p 432 (MLJ); p 541 (CLJ):

> The grounds were fully spelt out in the letter and the charge was well drafted as it laid down all the important and relevant particulars. Any reasonable person would have had no difficulty in responding to the allegations made. The opportunity, reasonable and sufficient, was given to the respondent to make a representation to rebut the charge.

[59] We agree with the HCJ that the first charge contained particulars sufficient for the appellant to prepare his representation namely, inter alia, dates of the 116 transactions, the identity card numbers of the CDL holders, the original class and the class added, and the transaction code and ID.

[60] The charges were valid such that the principle sought to be applied from *Esso Production* that 'the validity or otherwise of the charges was the threshold of the matter before the merits could be considered', had been met.

A NO FINDING OF GUILT BEFORE IMPOSITION OF PUNISHMENT

[61] The appellant referred to reg 37D(a) and (b) of the Discipline Regulations 1993 that the DA should have found the appellant guilty of the first charge before it could decide on the appropriate punishment. Both these paragraphs states if the DA 'finds the officer guilty' and goes on as to the punishment to be meted.

[62] The Federal Court in *T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan Satu Lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302 held at p 110 (MLJ); p 316 (CLJ):

> *Bagi mempertimbangkan alasan ini ingin kami nyatakan bahawa mengikut undang-undang perayu tidak perlu didapati bersalah. Yang perlu dipertimbangkan oleh responden pertama ialah sama ada representasi yang dikemukakan oleh perayu itu dapat membebaskan (exculpate) dirinya dari tuduhan terhadapnya dengan memuaskan.* Sekiranya representasi perayu tidak dapat berbuat demikian terhadap beliau maka responden pertama berhak menjatuhkan hukuman serta-merta.
>
> Di dalam kes *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513; [1992] 1 CLJ 413; [1992] 2 CLJ Rep 467, Eusoff Chin J *ada menyatakan demikian:*
>
> > As regards the issue of 'finding of guilt' of the plaintiff before the PSC imposed the punishment of dismissal, I think it is perfectly clear that O 26(4) of the G 0 'D' does not require the PSC to make such finding. *What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC.* (Emphasis added.)

[63] Further, we note there is also reg 37(4) which provides that if the representation does not exculpate the appellant, the DA shall proceed to consider and decide on the dismissal or reduction in rank. The aforesaid provision reads as follows:

> (4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

[64] *Utra Badi* at p 439 (MLJ); p 550 (CLJ) had this to say:

> We next look at para [4] of General Order 26 of the general orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:
>
> > (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

> Would the words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

[65] We, therefore, find that reg 37D of the Discipline Regulations does not apply where there is no investigation committee established.

NO OPPORTUNITY TO CORRECT OR CONTRADICT DOCUMENTS OR COMMENTS

[66] According to the appellant, the documents and or comments which he had no opportunity to correct or contradict were the comments of the head of department to the DA and on the appeal, documents from the digital technology section JPJ and the grounds of the chairman of the DA on the appeal. All these were said to be damaging and prejudicial to the appellant. Reliance was placed on *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169 where the Privy Council stated the person affected must know what evidence has been given and what statement has been made affecting him and then he must be given an opportunity to correct or contradict them. Reference was then made to *Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 3 MLJ 784; [2018] 2 CLJ 715 where the imposition of dismissal without giving the applicant the opportunity to explain and/or contradict the detrimental part of the report was a breach of natural justice and or procedural unfairness.

[67] We note, however, that there is no requirement for the respondents to give notice to the appellant of its intention to refer to any documents which necessarily includes the comments. There was further no application to the disciplinary board to be provided with the documents. In *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 ML J 725 it was held by the Federal Court:

> (2) The Court of Appeal was also correct in holding that there is no added duty on the Disciplinary Authority to provide documents without any request being made by the offending officer. Here the documents were provided to the Disciplinary Authority but not to the appellant ...

[68] On the alleged contravention of reg 16(2) and (3) of the Disciplinary Board Regulations 1993, where the DAB shall decide solely on the merits of the appeal without receiving any further statement or evidence and any further statement or evidence is subject to the right to be heard, the HCJ had made a finding the emails in question were a clarification of a matter raised in the appeal. We find no good reason to disagree with it as there was indeed a matter raised and a response provided.

[69] Added to that, in the present appeal, it must be reiterated that the appellant had admitted to the said charges, where he clearly stated:

> saya ... dengan rendah diri dan penuh keinsafan mengaku bersalah diatas kesemua pertuduhan yang dinyatakan terhadap saya ...

[70] We were, therefore, unable to agree with the appellant's submission.

INVESTIGATION COMMITTEE (IC)

[71] On the establishment of an IC, reg 37(5) of the Discipline Regulations provides that:

> (5) If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an investigation committee for the purpose of obtaining such further clarification.

[72] This, therefore, confers a discretion on the DA to establish an IC if further clarification is needed. There was no further clarification required more so when the appellant had in his written representation admitted the charges. There was thus no merit to the contention that an IC should have been established. This is supported by the decision *Vickneswary* at p 10 (MLJ); p 587 (CLJ), where the Federal Court explained:

> [22] ... Should the Disciplinary Authority consider that the case against the officer requires further clarification then it may appoint a committee of inquiry. *This is a decision of the Disciplinary Authority, not the officer or the court.* At this enquiry the officer will be allowed and if the committee shall so determine shall be required to appear before it and exculpate himself. Again this is the decision of the Disciplinary Authority. (Emphasis added.)

ORAL HEARING

[73] We find there is no requirement for an oral hearing at the DA or DAB. In this regard, reg 37(2)(b) and (4) of the Discipline Regulations provide for a written representation whereas reg 15(1) of the Disciplinary Board Regulations 1993 provides that an appeal shall be made in writing.

[74] On the right to an oral hearing, *Utra Badi* at p 449 (MLJ); p 562 (CLJ) said the following:

> Subsequently, the same point was reiterated in *Ganasan a/l Marimuthu v Public Services Commission* where the Court of Appeal held as follows:
>
> > The Privy Council as well as the Supreme Court have held that in employing the procedure prescribed in general order 26 and the former reg 30 of the general orders, the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body. In all such cases, it has been

> held time and again by the highest courts in the land that written representations will suffice and that a fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the Disciplinary Authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

[75] At p 563, it answered the second question 'Does art 135(2) of the Federal Constitution require the relevant Disciplinary Authority to afford the public officer an oral hearing, in the negative'.

[76] This principle has been reaffirmed by the Federal Court in *Tay Chai Huat* at p 162 (MLJ); p 593 (CLJ):

> [25] In *Utra Badi* this court held that the right to be heard given by art 135(2) of the Federal Constitution does not require that the member of the service facing the disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

FAILURE TO GIVE REASONS

[77] The appellant relied on reg 15(3) of the Disciplinary Board Regulations 1993 to support its proposition that the DA and DAB have a duty to give reasons. The provision including reg 15(4) state as follows:

> (3) On receipt of the appeal under sub-regulation (2) the disciplinary board shall cause to be prepared a copy of the records of proceedings of the disciplinary board, including the grounds on which the disciplinary board relied upon in arriving at its decision.
>
> (4) The records of proceedings prepared under sub-regulation (3) together with the grounds of decision and the appellant's appeal shall be sent to the Disciplinary Appeal Board not later than thirty days from the receipt of the appeal by the disciplinary board.

[78] A perusal of the aforesaid provisions would indicate that, without more, there is no obligation on the disciplinary board to provide reasons. It merely provides the procedure on preparing the record of proceedings which includes the grounds relied on and the period within which the record together with the grounds of decision are to be sent.

[79] We add there is nothing in the disciplinary procedure in Discipline Regulations 1993 which requires reasons to be given. In particular, we refer to reg 34 on the conditions for dismissal or reduction in rank, reg 37 on the procedure to be followed and reg 38 with regard to the punishment to be imposed.

[80] We refer to *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586 and *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 for the duty to give reasons when there is no express duty to do so. In *Mohamad Hassan*, this was said at pp 605 and 606:

> [46] Without diminishing its importance and contributions to many respects in the law on judicial review and the law of bias, the Federal Court's decision in *Majlis Perbandaran Pulau Pinang* concerns the local authority's imposition of conditions to its approval of the respondent's application for planning permission. The facts are not really important for our present purpose, but the Federal Court's views on the principles on the duty to give reasons are Generally, the principles that can be deduced from the Federal Court's decision on this issue may be summed up as follows:
>
> (a) the duty to give reasons depends on whether there is an express duty to do so;
>
> (b) where there is no express duty, the court should consider whether there is an implied obligation to state reasons;
>
> (c) if there is no express or implied obligation, is there a power to give reasons?
>
> (d) at common law, although there is no universal duty to give reasons, the trend is to give reasons;
>
> (e) this trend is consistent with current development towards an increased openness on matters of government and administration;
>
> (f) the giving of reasons is a matter of fairness; and
>
> (g) this trend proceeds on a case by case basis.
>
> [47] Aside from finding that there were exceptional circumstances, the Federal Court in *Majlis Perbandaran Pulau Pinang* held that for the reasons set out above, the appellant must give reasons for its decision. In the Federal Court's words, 'to put it mildly, the circumstances here were such as to cry out for an explanation from the council'. Therefore, contrary to the learned judge's conclusion that Majlis Perbandaran Pulau Pinang is authority for the proposition that the law does not at present recognise a general duty to give reasons, following on from this decision of Federal Court, there is in fact such a duty whether it is due to presence of exceptional circumstances, or due to 'the particular circumstances of a particular case', or as a result of the 'classes of cases where the duty to give reasons may exist in all cases of the class'.

[81] On the facts of *Mohamad Hassan*, it was held at p 610:

> [60] We are of the view that where the statutory authority makes available to its employees the option to retire early, it is only reasonable if not of perfectly logical sense that any rejection of any application to exercise that option must be explained; more so when it is made after the basic and only requirements have unquestionably been met. The very nature and circumstances of the application, that is, to opt to

> retire early from the service of the respondent, mandates a reading into s 12(1) an implied duty to provide reason for any withholding of consent to that option ...

[82] Thus, the proposition to be derived is that when there is no express or implied duty to give reasons, it falls on a case by case basis whether reasons ought to be given. This is intertwined with whether the decision should be set aside on the ground of irrationality for lack of a reason.

[83] The HCJ had given due consideration to the facts of the case, one of which was the appellant had admitted to the charges and had not withdrawn the admission in his appeal to the DAB. These are not circumstances which cry out for an explanation as per *Majlis Perbandaran Pulau Pinang* or render the decisions irrational.

PROPORTIONALITY

[84] We agree with the appellant that proportionality can be a ground for judicial review. Support for this proposition can be found in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 at p 15 and *Telekom Malaysia* at p 305 where both cases referred to *R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

[85] Although the HCJ was doubtful whether proportionality or disproportionality could be a fourth ground for judicial review, it was stated at para 68 of the judgment as follows:

> 68. Even if it is assumed that 'disproportionality' is a separate ground for judicial review of DA's Decision and DAB's Decision, I find that these decisions are not 'disproportionate' in their effect (resulting in the applicant's dismissal). This is because:
>
> (1) the applicant had been guilty of a serious disciplinary offence consisting or 116 Transactions which spanned over a period of more than six months (from 14 December 2012 until 4 September 2012);
>
> (2) the applicant had abused his public position of personal advantage within the meaning of reg 4(2)(c)(ii) POR; and
>
> (3) the applicant's punishment will deter all other public officers from committing the same or similar disciplinary offence in the future.

[86] On the factual matrix, there were therefore ample grounds to find that the punishment was proportionate to the charge.

A CONDONATION

[87] We find that condonation has been pleaded by the appellant in para 14(t)(i) and (ii) of his affidavit in support (encl 4/22–23). These related to the appellant being called to attend interviews for promotion in 2014, 2015 and 2017 where he was successful in 2017 subject to vacancy and was a reserve candidate for an acting post.

[88] We agree that the Federal Court in *Vickneswary* at p 16 (MLJ); p 594 (CLJ) has recognised condonation:

> [39] On the question of condonation raised by the respondent and referring to the case of *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263; [1997] 1 CLJ 257, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee, Condonation can be in the active form ie, by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action. *Halsbury's Laws of England* (4th Ed, Vol 16) at p 439 para 648 describe condonation as follows:
>
> > An employer who with full knowledge of his employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned.
>
> In our case, the second appellant cannot be said to have condoned the acts of the deceased because the deceased, as admitted by him in his letter, was interdicted ('ditahan kerja').

[89] The acts of condonation, if any, would amount to passive condonation, of not taking any action. Here, without any disciplinary action having been taken at that point of time, there was nothing to prevent the appellant from being called to attend the interviews and even succeeding. Hence, we find these acts did not amount to passive condonation.

[90] On the appellant not being interdicted, this was not pleaded in his affidavit.

H PRESENCE OF INTERESTED PARTIES

[91] In the meeting of the DB, interested parties, as termed by the appellant, were present. They were Jamil bin Mohd Dahlan (investigating officer and director of integrity/discipline), Noraini bt Mohd Nawi (principal assistant director, integrity section), Noorashikin bt Bahari (assistant director, discipline unit) and JPJ officers. In the DAB, there were 17 others including the legal advisor (LA).

[92] It was submitted the presence of these parties had rendered the

disciplinary proceedings defective. Further, where the DAB was legally represented, the appellant ought to be allowed to be heard.

[93] Reference was made to *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 that it is contrary to natural justice to allow one side to be legally represented but refuse the same right to the other and that this is a gross violation of the fundamental principles of natural justice.

[94] On the presence of the interested parties (other than the LA, which will be dealt with separately), the HCJ examined the establishment and composition of the DA and DAB as set out in regs 2 and 12of the Disciplinary Board Regulations 1993. The following was then said in paras 48 and 49 of the judgment:

> 48. There is nothing in regs 2 and 12 PSR which prohibit the attendance of interested parties in the meetings of DA and DAB. The DA and DAB are masters of their own procedure and may invite any party to sit in their proceedings. I refer to the Court of Appeal's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310, at p 314:
>
> > *... Where the appellant has, with respect, misled himself is, we think, in equating a domestic inquiry with a formal trial in a court. This is not the law. In this regard, we agree and gratefully adopt the view expressed by L'Heureux-Dube J speaking on behalf of the majority of the Supreme Court of Canada in The Board of Education of the Indian Head School v Knight. It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.*
>
> 49. It is essential that the decisions of the DA and DAB should be made solely and independently by DA and DAB respectively. There is no affidavit evidence by the applicant to show that DA's Decision and DAB's Decision had been made by the interested parties. In the circumstances, the mere presence of interested parties in the meetings of DA and DAB cannot invalidate DA's Decision and DAB's Decision in this case.

[95] The HCJ essentially said that the presence of such parties was not prohibited by regs 2 and 12 of the Disciplinary Board Regulations 1993. The DA and DAB being masters of their own procedure, were at liberty to invite anyone. Critically, the HCJ noted that the decisions must be made independently by the DA and DAB and found there was no evidence that those interested parties had made the decisions which are now being challenged.

[96] Hence, it can be said those parties were present, but did not participate in the proceedings.

[97] We refer to the appellant's case of *Lee Mew Kwan v Royal Lake Club (through Jasmin bt Mohd Sharif as Secretary and Officer to Kelab Taman Perdana Diraja Kuala Lumpur)* [2013] 1 MLJ 583 at p 593, which in fact held that there must be participation:

> ... that the complainant or prosecutor should not participate in a decision or in an appeal from a decision and should not even appear to participate; to do so would be contrary to the rule of natural justice.

[98] At p 591, this was said earlier:

> [9] I find the hearing of the appeal was conducted unfairly. The appeal committee had a potpouri of members, all of whom should not in all fairness have sat in the first place and deliberated on the matter and by the time the appeal committee was eventually formed it can hardly be said the objectivity and impartiality could be exercised as much discussion had already taken place on the appeal.

[99] Hence the court looks at participation and not presence, of which there was none here. The parties present were listed under 'TURUT HADIR' (encl 6/20 and 127).

[100] On the presence of the LA it is noted that she was similarly listed under 'TURUT HADIR', No 12 (encl 6/127). This meant she was merely in attendance as opposed to being a participant or participating as a legal advisor which is the designation of the post.

[101] We find that reliance on *Federal Hotel Sdn Bhd* is misplaced. It was stated in held at para [6] at p 175:

> [6] It was clearly contrary to natural justice in this case to allow one side to be legally represented but to refuse the same right to the other. In the circumstances there was a gross violation of the fundamental principles of natural justice.

[102] That was a case where on the hearing which led to the second award, there was a change of solicitors acting for the appellant but counsel was told he could not appear for the appellant as no warrant of authority to appear had been applied for. The appellant was without legal representation that day. This was despite the appellant's new solicitor giving notice to the court it would formally submit that the court had no jurisdiction in respect of any proceedings after the first award.

[103] It was in the context of those facts that the Federal Court held there to be gross violation of the fundamental principle of natural justice. That is not the case here with the presence, and nothing else, of the LA.

[104] We, therefore, find that the presence of the aforesaid parties did not render the disciplinary proceedings defective.

CONCLUSION

[105] For the reasons given above, the appeal was dismissed and the order of the HCJ was affirmed, with costs of RM 10,000 to the respondents, subject to allocatur.

Appeal dismissed and order of High Court affirmed with costs.

Reported by Mohd Kamarul Anwar